UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

PETS' RX, INC. d/b/a VCA NORTHWEST VETERINARY SPECIALISTS,	)	
EMPLOYER	)	
	)	**Case: 19-RC-221706**
and	)	
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 5,	)	
PETITIONER	)	

PETS' RX, INC. d/b/a VCA NORTHWEST VETERINARY SPECIALISTS REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND ORDER RESOLVING CHALLENGED BALLOTS

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I. INTRODUCTION

Pursuant to 102.67(c) of the National Labor Relations Board's Rules and Regulations, Pets' RX, Inc. d/b/a VCA Northwest Veterinary Specialists ("VCA" or "the Employer"), requests that the National Labor Relations Board ("NLRB" or "the Board") review the Decision and Order Resolving Challenged Ballots ("Decision")[1] issued by the Regional Director of Region 19 on October 5, 2018, and ordering that the ballot of Monica Neptune be opened and counted. As required by Section 102.67(d), compelling reasons exist for the Board's review based on the following grounds:

1. The Regional Director's Decision on substantial factual issues regarding the employment status of Ms. Neptune is clearly erroneous on the record and such error prejudicially affects the rights of VCA.

2. The Regional Director's Decision raises a substantial question of law and policy because the Decision fails to apply Board precedent regarding the application of the Board's *Davison-Paxon* test.

In sum, the Regional Director ignored undisputed, uncontroverted record evidence to ignore twelve months of Ms. Neptune's employment history in order to avoid application of the Board's standard test for voting eligibility and to create a predicate for considering hours worked *after* the eligibility cutoff date.

[1] The Regional Director summarily overruled all of VCA's exceptions to the Hearing Officer's findings. To the extent that VCA has not specifically discussed each and every exception to the Hearing Officer's Report on Challenges, VCA incorporates the exceptions and brief filed in support thereof into this Request for Review.

II. BACKGROUND

The National Labor Relations Board held an election pursuant to a Stipulated Election Agreement on July 3, 2018, and July 5, 2018, among a unit consisting of "all full-time and regular part-time non-professional employees, including credentialed veterinary technicians, veterinary assistants, technician assistants, doctor's assistants, client service representatives, and referral coordinators." (Board Exhibit 1). During the election, the Union and the Region challenged four ballots including the ballots of Ms. Neptune and Sonya Huskey. On July 20, 2018, the parties entered into a Stipulation Resolving Challenged Ballots, which resolved two challenged ballots, but the parties were unable to resolve the challenges to the ballots cast by Ms. Huskey and Ms. Neptune. Accordingly, the Region issued an Order Directing Hearing to resolve the issues raised by the challenged ballots. The only issues before the Hearing Officer were whether Ms. Huskey and Ms. Neptune were eligible to vote.

The parties held a hearing on August 8, 2018, before Hearing Officer Kristen White. On September 7, 2018, Ms. White issued the Hearing Officer's Report on Challenged Ballots. In that report, Ms. White concluded that Ms. Huskey is not a statutory supervisor; that the Union's challenge to her eligibility to vote should be overruled; and that Ms. Huskey's ballot should be opened and counted. With respect to Ms. Neptune, the Hearing Officer concluded that Ms. Neptune was a "newly hired employee" as of May 9, 2018, and that it is appropriate to count the hours Ms. Neptune worked up to and including the July 5 election day. In the alternative, the Hearing Officer found that Ms. Neptune was on an employment hiatus from May 5, 2017, to May 9, 2018, and that it is appropriate to evaluate the work Ms. Neptune did before and after that date. Under either standard, the Hearing Officer recommended that the Employer's challenge to Ms. Neptune's eligibility be overruled and that her ballot be opened and counted.

On September 21, 2018, the Employer filed Exceptions to the Hearing Officer's Report on Challenged Ballots, and a Brief in support thereof, regarding the Hearing Officer's findings and recommendations as to Ms. Neptune. On October 5, 2018, the Regional Director for Region 19 issued a Decision and Order Resolving Challenged Ballots overruling all of the Employer's exceptions and affirming the Hearing Officer's rulings.

The Employer now seeks review of the Regional Director's decision pursuant to Section 102.67(c) of the Rules and Regulations.

III. STATEMENT OF FACTS

VCA operates a full service veterinary hospital in Clackamas, Oregon. For operational purposes, VCA has two primary departments: Emergency Room/Intensive Care Unit (referred to as "ER/ICU") and Specialty. VCA employs approximately 40 veterinarians, 80-100 Techs (including Tech[2] Assistants), and six administrative managers. (*Id*., Tr. 17:22-18:1; Tr. 19:13-19); (Arthurs, Tr. 67:1-68:21).

VCA first hired Ms. Neptune in January 2015 as a full-time Tech Assistant. As a new hire, Ms. Neptune was required to have a face-to-face interview followed by a longer working interview. (Collins, Tr. 183: 8-16). Thereafter, Ms. Neptune was required to complete new hire paperwork and required to go through the new employee onboarding process, which involved on the job training from her team. (Collins, Tr. 183:2-184:11; Neptune, Tr. 248:3-8). Ms. Neptune was assigned to work in the ER/ICU, where she remained on a full-time basis until May 2017. (Neptune, Tr. 263:2-14).

[2] The term "Tech," "Techs," or "Technicians" refers generically to credentialed veterinary technicians, veterinary assistants, and technician assistants.

In May 2017, Ms. Neptune resigned from her full-time position to take a job closer to home. (Employer Ex. 5). At the time of her resignation, Ms. Neptune was working as a second job as bartender, was going to school, and was caring for two small children. (Neptune, Tr. 258:1-259:21; 262:17-22). Ms. Neptune stepped down from regular full-time employment because she was looking for a better working arrangement for her hectic life and was attending school. (Employer Ex. 5; Neptune, Tr. 261:11-13). However, Ms. Neptune wanted to continue to work at VCA when her schedule permitted. According to Ms. Neptune, her VCA colleagues were like family and she wanted to stay in "relief" status[3]. (Neptune, Tr. 257:8-25). Ms. Neptune's resignation letter made this specific request:

> *I do hope to stay on as relief if you need coverage.*

(Employer Ex. 5, emphasis added). The Employer granted her request. VCA continued to employ Ms. Neptune as a relief employee effective May 8, 2017. (Employer Ex. 5; Neptune, Tr. 257:8-25).

In accordance with VCA policy, the Employer sent Ms. Neptune a new offer letter dated May 8, 2017, confirming Ms. Neptune's status as a "relief" employee. (Employer Ex. 6). The May 8, 2017, offer letter noted that Ms. Neptune would become an on-call/relief ER/ICU technician with a start date of May 8, 2017; that she would earn $13 per hour for relief shifts; that she would be covered by VCA's workers' compensation policy; and that her schedule would be "open shifts that you [Ms. Neptune] signed up for as per your communication with the hospital." *Id.* As a relief employee, Ms. Neptune was not eligible for VCA benefits. *Id.* Ms. Neptune signed the new offer letter and remained a "relief" employee from May 8, 2017, to the present. (Collins, Tr. 195:8-

[3] A relief tech contacts the hospital to ask for shifts based upon the employee's availability and/or ability to work. (Collins, Tr. 205:24-206:6; Collins, Tr. 193:24-194:195:15)

15). As a relief employee, Ms. Neptune was not eligible for company benefits such as paid time off or health insurance. Ms. Collins also created a new personnel change request form documenting the change from full-time to relief status effective May 8, 2017. (Employer Ex. 7; Collins, Tr. 11-17). Further, Ms. Neptune's schedule as reflected by her offer letter clearly shows she was a "relief" employee — open shifts that she signed up for per her communication with the hospital. (Collins, Tr. 206:4-11). Ms. Neptune worked her first relief shift in May 2018. (Employer Ex. 9).

At the hearing, Ms. Neptune *admitted* that she requested "relief" employment status and remained on it for the entire period beginning May 2017. (Neptune, Tr. 249, 257-258). Moreover, as demonstrated by Ms. Neptune's offer letter, "relief" is an employment status recognized and documented by the Employer. (Employer Ex. 6). An employee in relief status is responsible for communicating her availability for open shifts. (Collins, Tr. 193:24-194:195:15; Brashear, Tr.225:21-226:9). Here, Ms. Neptune testified that she reached out to Kyle Gordon (at Ms. Brashear's request) <u>one</u> <u>time</u> in or about December 2017 to inquire about shifts, but was not given a shift. (Neptune, Tr. 249:5-250:11). Ms. Neptune made no further attempt to follow up with Mr. Gordon or to otherwise seek to work a shift until April 30, 2018, when she contacted Ms. Brashear, the Director of Nursing, by email and text messaging to again ask for relief work. (Neptune, Tr. 249:17-25; 262:23-263:1). Thus, although relief employees are responsible to contact the Employer when they are available to work and to seek any open shifts which may be available, Ms. Neptune did so only one time between May 8, 2017, and April 30, 2018. "Relief" status required Ms. Neptune to use her *own* initiative to seek work.

On April 30, 2018, — just the second time that Ms. Neptune checked in for relief work since May 8, 2017 — Ms. Neptune was offered a shift the following week on May 9, 2018.

(Employer Ex. 10). Thus, acknowledging her relief status and eligibility to work the shift, Megan Brashear awarded Ms. Neptune that shift and, on Sunday, May 6, 2018, listed her on the formal schedule for May 9, 2018. Ms. Brashear instructed her to bring her identification just in case she had to update her employment paperwork as Ms. Brashear knew that some time had passed since Ms. Neptune had worked a shift and that VCA's policy requires that such paperwork be updated if an employee does not work a shift for an extended period of time. (Brashear, Tr. 234:16-24; Employer Ex. 10).

On May 9, 2018, Ms. Neptune reported to work and immediately went to work on the floor with the other techs. (Neptune, Tr. 263:2-11). In fact, Ms. Neptune returned to the exact same department (ER/ICU) where she previously worked. When asked at the hearing if she went "right back to the place you always went," Ms. Neptune testified: "Yeah. The same team, just a few new people, but same ER doctors." (Neptune, Tr. 263:7-17). Sometime on May 9, 2018, she also agreed to work on Friday, May 11, 2018.

Although Ms. Neptune was required to update her employment paperwork, she worked a full shift and was scheduled to work a second shift before doing so sometime on May 11, 2018. (Collins, Tr. 211:16-212:10). Ms. Neptune was not required to participate in the new hire process or go through VCA's lengthy interview process, which consisted of an office interview and an on-the-job interview, and was not required to complete on the job training. In addition, VCA did not check Ms. Neptune's references or credentials. (Collins, Tr. 212:8-10).

In fact, Ms. Collins learned of Ms. Neptune's return to work only after she saw her working on the floor on May 9, 2018. At that time, Ms. Collins asked Ms. Neptune to update her employment paperwork (i.e. her application, direct deposit, personal information form, W-4) explaining that VCA needed to be sure it had her current information. In part because of Ms.

Neptune's letter resigning from her full-time role in May 2017, Ms. Collins knew that Ms. Neptune had been enrolled in school and had worked another job in the interim. (Collins, Tr. 202:1-11; Employer, Ex. 5). Ms. Collins told Ms. Neptune to use a time clock adjustment slip for May 9, 2018, pending reactivation of her time clock number. As requested, Ms. Neptune updated her paperwork on May 11, 2018, reactivating her on the timekeeping system with the same time clock identification number and email address that she had since she began working at VCA in 2015. (Collins, Tr. 197:5-22).

Pursuant to VCA policy and hospital practice, Ms. Collins drafted another offer letter for Ms. Neptune on May 11, 2018, confirming her relief tech status and including her hourly rate. (Collins, Tr. 202:24-203:5). The 2018 offer letter was identical in substance to Ms. Neptune's previous offer letter dated May 8, 2017, and was intended to confirm a continuation of Ms. Neptune's "relief" tech status and did not mark a change in Ms. Neptune's employment status. The offer letter further confirmed that there would be no change in her pay rate or relief tech status. (Collins, Tr. 202:24-204:9). The terms of Ms. Neptune's employment when she returned to work in May 2018 were the same as they were in May 2017. (Collins, Tr. 202:20-203:12). Ms. Neptune worked only three shifts during the eligibility period. (Employer Ex. 9).

That VCA placed Ms. Neptune on inactive payroll status on or about August 7, 2017, had no bearing on her status as a relief employee. As Ms. Collins explained, she cleans up the payroll system by moving all relief techs who have not picked up shifts in 90 days to "inactive" payroll status to avoid unnecessary payroll costs. (Collins, Tr. 201:14-21). Because "inactive" payroll status is administrative in nature and does not impact a tech's ability to return to work, Ms. Collins did not even notify Ms. Neptune. Being placed on "inactive" payroll status had no bearing on Ms. Neptune's relief status or ability to take shifts at VCA. (Collins, Tr. 209: 4-18). An inactive relief

tech is still a VCA employee and is eligible to return to work at any time as reflected by Ms. Neptune's return to VCA in May 2018. (Collins, Tr. 209:19-21).

IV. ARGUMENT

A. The Regional Director's Decision on a Substantial Factual Issue Is Clearly Erroneous on the Record and Such Error Prejudicially Affects the Rights of a Party.

1. The Regional Director Ignored Admitted, Uncontroverted Record Facts Regarding Ms. Neptune's Relief Employment Status.

The Regional Director's finding that "Neptune was a new hire on May 9, 2018" (Decision, p. 4) is clearly erroneous based on the overwhelming and undisputed evidence in the record.[4] In fact, the Regional Director's finding ignores multiple key, uncontroverted facts in the record including the undisputed fact that Ms. Neptune was a "relief" employee as of May 7, 2017, and her relief employment status has continued without a break in service since that time. It is uncontested, indeed admitted, that as a relief employee, Ms. Neptune was required to contact VCA if and when she was available to work. When VCA chose to continue Ms. Neptune's employment in a relief capacity, both parties contemplated and understood that Ms. Neptune's availability to work would be limited and infrequent because of her other obligations — namely school, another job, and family obligations. Given Ms. Neptune's limited availability, VCA accorded Ms. Neptune relief employment status and continued her employment in that capacity affording her the ability to accept shifts when her schedule permitted. Ms. Neptune's schedule and classification prior to May 8, 2017, is not germane to her current employment status because she admittedly

[4] The Regional Director noted that some of the Employer's exceptions appear to take issue with the Hearing Officer's credibility findings; the Regional Director found no basis for reversing those findings. The facts identified by VCA with respect to Ms. Neptune, however, do not turn on credibility and are undisputed.

entered a new status at that time — a status that was specifically tailored to her very limited availability.

The Regional Director's conclusion that Ms. Neptune was a new hire as of May 9, 2018, further (and necessarily) ignored the fact that Ms. Neptune sought work in December 2017 (albeit unsuccessfully) as a relief employee. The fact that VCA did not have an open shift for her in December 2017, did not alter Ms. Neptune's relief status as she continued to have the ability to seek and accept open shifts (as she did in April 2018, when her circumstances changed). Further, relief status did not guarantee that VCA would have work available for Ms. Neptune upon demand. Instead, it was up to Ms. Neptune to solicit work based on her schedule as she successfully did on April 30, 2018.[5] These facts, all critically ignored by the Hearing Officer and the Regional Director, refute the conclusion that Ms. Neptune was a new hire in May 2018.

In fact, if Ms. Neptune was a new hire and if her employment had ceased prior to April 2018 when she solicited and obtained work, VCA would not have immediately placed Ms. Neptune on the schedule. To the contrary, it is undisputed that VCA immediately scheduled Ms. Neptune for work without hesitation. Moreover, Ms. Neptune returned to work without going through an interview or new hire process. Upon arriving at VCA on May 9, 2018, Ms. Neptune immediately began working on the floor with the other techs in the exact same department as she always had, with the same co-workers and veterinarians.

Further, the Hearing Officer and, in turn, the Regional Director confused Ms. Neptune's employment status and erroneously concluded that she was "on-call" as opposed to relief. An on-

[5] The Hearing Officer referenced as significant to the decision to disregard Ms. Neptune's relief status the fact that she claimed to have applied for a full-time dermatology position. (Hearing Officer Report, p. 10, Para. 3, lines 8-11). The fact that Ms. Neptune applied for and was not interviewed for the alleged role is irrelevant to her relief status. The alleged unsuccessful attempt to change her status does not evidence the termination or modification of her relief status.

call technician must be available to work an on-call shift and is required to work when called. (Collins, Tr. 194:7-195:4). A relief tech contacts the hospital to ask for shifts based upon her schedule and/or ability to work. Ms. Brashear, Ms. Collins, and Ms. Neptune all testified that Ms. Neptune was *relief* (as opposed to *on-call*). Based on this erroneous premise, the Hearing Officer concluded that VCA never put Ms. Neptune's new employment status into practice because it never called her for work.[6] This fundamental misunderstanding caused the Hearing Officer and the Regional Director to completely ignore Ms. Neptune's documented employment status. As reflected by the testimony in the record, however, Ms. Neptune was a *relief* employee —not on-call.[7]

The Regional Director ignored these critical facts in concluding that Ms. Neptune was a newly hired employee.

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[6] Moreover, the Hearing Officer's reliance on the fact that "Neptune received no benefits, no benefit accrual, no awards, no work direction, and no compensation of any kind from May 2017 to May 2018" further shows the Hearing Officer's failure to comprehend relief employment. (Hearing Officer's Report, page 15) As a relief employee, Ms. Neptune was not eligible and did not accrue benefits nor was she entitled to compensation unless she chose to work an open shift. The offer letter specifically noted that, "Except as required by law you are not eligible to participate in certain VCA benefits programs: such as vacation, sick, or health insurance." Again, the Hearing Officer's decision appears to disagree that relief employment can be a form of actual employment in this case because company benefits are generally inapplicable.

[7] See, Collins, Tr. 186:25-187:2 (noting that Ms, Neptune "was available to do *relief*."); Collins, Tr. 190:14-18 (testifying that Neptune asked to stay on as *relief* and that she remained an employee of the Company); Collins, Tr. 190:24-191:2 (Neptune transitioned to *relief* capacity following her two-week notice period); Collins, Tr. 193:24-194:195:15 (explaining that "on-call" and "relief" are two separate terms); Collins, Tr. 195:13-15 (noting that Neptune was eligible to pick up relief shifts for the Company.); Collins, Tr. 205:24-206:11 (noting that "relief would apply to her because that was the type of shifts she was picking up. It's when she was available and when we had shifts available.") See Brashear, Tr. 224:21-23 ("She told me she wanted to remain on as *relief*, and as her supervisor, I'm the one that told Phyllis that, yes, we'll keep her on as *relief*.); Brashear, Tr. 225:21-226:9 (also differentiating "on-call" with "relief" and confirming that Neptune was a *relief* employee); See Neptune Tr. 249:5 ("I believed I was relief…"); Neptune, Tr. 257:11 ("I was available for relief, yeah").

2. The Regional Director's Emphasis on Ms. Neptune's Failure to Work Between May 2017 and May 2018 Has No Bearing on Ms. Neptune's Relief Employment Status.

The Regional Director's reliance on VCA's failure to offer Ms. Neptune work between May 8, 2017, and May 9, 2018, is not dispositive of Ms. Neptune's employment status during that time and, once again, ignores Ms. Neptune's relief status.[8] That Ms. Neptune chose not to actively seek work based on personal obligations did not change her employment status nor refute that she was a relief employee from May 8, 2017, to present. In fact, during this time period (May 2017 to April 2018), the record evidence shows that Ms. Neptune had another job as a bartender and was a student at Portland Community College ("PCC"), which explains her infrequent efforts to seek work from May 2017 through April 2018.[9] It is clear from this testimony that despite Ms. Neptune's other engagements, Ms. Neptune fully intended to remain a relief employee, so that she could continue to have the right to take relief shifts at VCA. In May 2017, however, both parties contemplated that Ms. Neptune's work schedule may be infrequent and, in fact, the offer letter noted that Ms. Neptune's schedule as a relief employee was "open shifts that [she] signed up for as per [her] communication with the hospital." (Hearing Officer's Report, p. 10).

The Regional Director ignored the uncontroverted evidence that at all material times Ms.

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[8] Further, the Hearing Officer and the Regional Director's conclusion is based, in part, on the erroneous belief that Ms. Neptune was an on-call employee as opposed to a relief employee.

[9] Notably, Ms. Neptune had returned to school and her failure to work from May 2017 to May 2018 tracks the academic school year. Further, the one time she did seek work was in December, a holiday break. As discussed in *Orland Park Motor Cars, Inc.,* 333 NLRB 1017, 139-140 (2001), an employee with a pattern of irregular employment, consistent with that of a student, does not share a community of interest with unit employees over time and is a casual, irregular employee. In such cases, the Board does not exclude the hiatus period (i.e. when the employee is in school), but factors the academic year into the overall analysis to determine whether the employee shares a community of interest with employees in the bargaining unit.

Neptune's employment status was that of a relief employee, as defined by the Employer and accepted by the employee. Indeed, the employee *requested* the status. Her former employment as a regular full-time employee *ended.* Ms. Neptune resigned from her full-time position and commenced employment in May 2017 as a relief employee with the understanding that her actual working time would be irregular and subject to the employee's self-defined availability. This was confirmed in writing by the Employer.[10] This was the agreement of the parties. There is no evidence that this was a sham, there is no suggestion that it was anything other than what it was on its face: continued employment by VCA of an experienced technician when the employee was available (provided work was available). That relationship was not terminated.

However, the Regional Director did not accept that this non-traditional arrangement was the employment relationship agreed upon by the parties. The Decision oddly characterized VCA's relief position as "an existential state" of employment adopted by the Employer. (Decision, p 4). The Regional Director's apparent implication is that Ms. Neptune's relief status was a pretense by

[10] The Regional Director tellingly failed to give any weight to VCA's offer letter of May 2017 confirming her relief status, while acknowledging the Employer's reiteration of that letter in May 2018. The Regional Director found the 2018 letter to be evidence that Ms. Neptune was a new hire, yet the Decision ignored the 2017 letter which actually established her initial status as a relief employee. VCA's decision to issue Ms. Neptune an offer letter on May 9, 2018, does not support the Hearing Officer's decision that Ms. Neptune is a new hire. The offer letter generated by Ms. Collins on May 9, 2018, simply reiterated and confirmed Ms. Neptune's relief status and employment terms. Further, Ms. Huskey was also issued an "offer letter" when she went from a Technician Manager to a Certified Veterinary Tech – again with no break in service. (Employer Ex. 1) The difference between the wording of Ms. Huskey's offer letter and Ms. Neptune's offer letter has no bearing on Ms. Neptune's employment status. The contexts in which each were issued were markedly different. Although the Hearing Officer pointed out, and seemed to rely on, the fact that Huskey's offer letter states that the Employer was "looking forward to your continued work with the VCA NWVS team" while Ms. Neptune's offer letter does not reference continued work, this difference does not convert Ms. Neptune into a new hire. As noted by the Hearing Officer, Ms. Huskey was demoted on April 20, 2018, and the May 1, 2018, offer letter resulted from that demotion. Naturally, the Employer wanted to reassure Ms. Huskey that she was a valued employee while memorializing the terms and conditions of her new employment.

VCA, notwithstanding that it was sought by the employee. Further, the Regional Director's inference was notwithstanding the absence of any rationale for VCA to create a bogus employment category.[11]

VCA's relief status did not satisfy the Regional Director's concept of "employment," therefore he rejected its existence. However, the question before the Board is not whether Ms. Neptune was an "employee," but whether she worked an adequate number of hours to justify voting eligibility. Ms. Neptune's employment status at all material times was a fact, plainly established by the record. Board law has a well-established vehicle for addressing the question posed in this case – the *Davison-Paxon* hours worked test. However, the Regional Director went to considerable lengths to avoid applying that test, including a rejection of the very existence of Ms. Neptune's employment during that period.

Further, the uncontroverted facts in the record show that Ms. Neptune remained on VCA's active payroll for the first three full months of her relief employment and remained eligible to take open shifts thereafter (as happened here). Ms. Neptune testified that she completed school in March 2018, took her state licensing in April, and then completed a practicum. (Neptune, 259:22-260:9). Ms. Neptune then reached out to Ms. Brashear – once she had completed her schooling and after she had completed her practicum – to see if Ms. Brashear had open shifts, which she did. It was up to Ms. Neptune to determine whether to seek relief shifts from VCA when it worked for

[11] Moreover, "relief" status was neither an invention nor was it unique to Ms. Neptune. Ms. Collins testified that there was another relief employee, Vicki Dicenzo, who also returned to work after being placed on "inactive" payroll status. (Collins, Tr. 210: 7-24). Like Ms. Neptune, Ms. Dicenzo resigned from her full-time position, took a job elsewhere, remained on relief status, didn't pick up a shift for several months, and was placed on "inactive" status. She was ultimately reactivated in payroll and returned to work without going through the new hire onboarding process, although she was made to update her new hire paperwork, including an updated application, tax forms, etc. *Id*.

her. Nonetheless, the Regional Director selectively focused on ancillary and extraneous facts: that Ms. Neptune was eventually dropped from the active payroll, her email password expired, her emails were deleted[12] and she needed to update her paperwork, time clock ID, and access keycard. However, the record is clear – none of these secondary clerical measures impacted her relief employment status as Ms. Neptune continued her relief employment and accepted work on May 9, 2018.[13]

It is well-settled that an employer's removal of an employee's name from its payroll is not determinative of employee status. *See,* e.g., *Anything Distributors, Inc.,* 04-RC-020682 (Sept. 5, 2003); 2003 NLRB Reg. Dir. Dec. LEXIS 306, at *18 (2003) (finding employee eligible to vote despite being removed from company's payroll "because he has a reasonable expectation of reemployment in the near future."); *Stretch-Tex Co.,* 118 NLRB 1359 (1957); *Matter of Phelps Dodge Co.,* 34 NLRB 846, 853 (1941) (finding laid off employees that were removed from the

[12] Although the Regional Director noted that VCA deleted Ms. Neptune's emails in the Decision (Decision, p. 4), Ms. Neptune testified only that her emails were not in her account when it was reactivated. (Neptune, Tr. 251:20-22).

[13] The fact that Ms. Neptune was required to update some of her employment paperwork does not support a finding that Ms. Neptune was a new employee. (Hearing Officer Report, p. 13). Although Ms. Brashear's May 2, 2018, email envisioned that VCA may require Ms. Neptune to update some paperwork, this administrative requirement did not delay her return to work on May 9, 2018. Nor did it delay her being awarded a second relief shift for May 11, 2018, prior to updating her paperwork. The timing of Ms. Neptune's return to work and providing services to VCA in relation to her updating paperwork only underscores the fact that updating the paperwork was merely a formality — and not a prerequisite to employment or required for continuing employment as suggested by the Hearing Officer. (*Id.*, p. 13). Moreover, even after receiving her updated paperwork, VCA did not check Ms. Neptune's references or otherwise assess her skills, did not require Ms. Neptune to complete the interview process (in either a static or on the job interview), nor did it require Ms. Neptune to participate in new hire training. Again, these facts show that Ms. Neptune was continuously employed in a relief capacity – as Ms. Neptune herself repeatedly acknowledged. The Hearing Officer discounted these important facts and noted that "familiarity with an applicant would obviate the need to discover certain details about the applicant's background." (Hearing Officer's Report, p. 13). However, it was Ms. Neptune's status as a relief employee that obviated the need to conduct an interview, assess her skills, check references, and provide training.

payroll eligible to vote); *Matter of Robbins & Myers, Inc.*, 7 NLRB 1119, 1124 (1938) (finding employees removed from the payroll pursuant to a company practice eligible to vote as they had a "reasonable expectation of return to the company's employ").

In fact, the Board presumes that an employee remains employed "absent an affirmative showing that the employee has resigned or been discharged." *Dakota Evans Restoration, Inc.*, 13-RC-021753 (June 10, 2008); 2008 NLRB Reg. Dir. Dec. LEXIS 140 (2008) ("The Board has a well-established standard of presuming that an employee on sick leave is eligible to vote in a representation election absent an affirmative showing that the employee has resigned or been discharged"). To establish an affirmative termination of employment, there must be "a manifestation of the intent to terminate which is clearly communicated to the other party." *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 607 (3d Cir. 1996). In short, "[e]mployees on layoff or leave of absence during the relevant period who have not quit or been terminated and have a reasonable expectation of recall qualify as eligible voters because of their continued ties to the employee unit." *Certified Corp.*, 241 NLRB 369, 372 (1979) (rejecting General Counsel's assertion that the employee was discharged, and therefore, a "new hire" based on his removal from the payroll, reasoning that "[e]mployees on layoff or leave of absence during the relevant period who have not quit or been terminated and have a reasonable expectation of recall qualify as eligible voters because of their continued ties to the employee unit."). For example, in *Liston Brick of Corona, Inc.*, 296 NLRB 1181 (1989), the Board, affirming the ALJ, concluded that an employee was eligible to vote despite being removed from the employer's payroll as a result of a leave of absence. *Id.* at 1202. In finding the employee eligible, the ALJ held that the employer failed to proffer sufficient evidence establishing that his employment was terminated. The ALJ reasoned

that the mere removal of an employee from an employer's payroll "was not demonstrated to constitute discharge." *Id.*

Here, there is no evidence in the record suggesting that VCA or Ms. Neptune terminated her relief employment at any time. And, in fact, the facts establish otherwise. Although the Region notes that the Board does not display a concern with the label placed on an employee's employment status and focuses instead on industrial practicalities, the Region has completely ignored the industrial practicalities of this workplace.

3. The Regional Director Misapplied Board Law in Reaching his Conclusion that Ms. Neptune was a New Hire.

The Regional Director erroneously concluded that Ms. Neptune was a "new hire" on May 9, 2018, by disregarding the relief employment period and misapplying the Board's decision in *Mid-Jefferson County Hospital*, 259 NLRB 831 (1981). (Decision, p 4.) The Board's decision in *Mid-Jefferson County*, however, supports VCA's position in this case and confirms that relief employment is actual employment.

In *Mid-Jefferson County*, the Board noted that "the ability to reject work when offered" is not determinative of an individual's employment status so as to exclude the individual from the unit as a casual employee. However, the Board went on to state that "the individual's relationship to the job must be examined: whether the employee performs unit work and whether the employer has a sufficient regularity of work to demonstrate a community of interest with the remaining employees in the unit regarding wages, hours, and working conditions." *Id.* at 832. In other words, an employee must work with sufficient regularity in advance of the eligibility cut-off date to meet the *Davison-Paxon* test and the employee's ability to accept or reject work is not dispositive provided that the individual works sufficient hours to meet the *Davison-Paxon* test.

Ms. Neptune remained an employee at all times because that was the express understanding of both VCA and the employee. Ms. Neptune's ability to set her own schedule does not negate her employment even if she worked 0 hours during a portion of the *Davison-Paxon* period. Consistent with *Mid-Jefferson County*, Ms. Neptune's relief employment status *must* be considered to appropriately evaluate whether she had "a sufficient regularity of work," which is the essence of the Board's *Davison-Paxon* test.[14] By excluding the relief employment period and treating Ms. Neptune as a new hire, the Hearing Officer did not properly analyze whether Ms. Neptune performed unit work with sufficient regularity during the eligibility period contrary to Board law. *See Mid-Jefferson County*, 259 NLRB 831 (1981); see also *Hampton Inn*, 309 NLRB 942 (1992) (employee who returned to part-time employment in May not eligible to vote when he worked only five hours from the beginning of May through July 12).

For example, in *Hampton Inn, supra*, the Board used the traditional *Davison-Paxon* test to determine whether a part-time, on-call employee with the ability to control his own schedule worked with sufficient regularity during the eligibility period. The employee in question, Scott Alter, commenced employment with the employer in February 1988 two days per week until October 1990. At that time, he was working a considerable amount of overtime at his full-time job and asked the employer not to schedule him for any work until his full-time job slowed down. Thereafter, Alter worked twice in January 1991 and once in February 1991. Although the employer testified that Alter returned as a regular part-time employee in May 1991, Alter worked only five hours from the beginning of May through July 12, 1991. Notably, the Board did not

[14] It is undisputed that Ms. Neptune was ineligible to vote based on the standard *Davison-Paxon* test. During the 13-week measurement period prior to June 2, 2018, Ms. Neptune worked only 32.9 hours — an average of 2.53 hours per week during the eligibility period.

consider Alter a "new hire" when he returned to part-time employment in May nor did it deviate from the *Davison-Paxon* analysis. Instead, the Board concluded that Alter did not work sufficient hours during the eligibility period and was therefore a casual employee. Applying the same analysis here, and taking into account Ms. Neptune's relief employment status, the Hearing Officer and the Region erred in concluding that Ms. Neptune was eligible to vote.

4. The Regional Director's Reliance on the Board's Decision in *Dyncorp/Dynair Servs., Inc.* is Misplaced.

The Regional Director's reliance on the Board's decision in *Dyncorp/Dynair Servs., Inc.*, 320 NLRB 120 (1995) does not support the conclusion that Ms. Neptune is a new hire and is cited out of context. In *Dyncorp*, the Board found that an employee whose only work prior to the eligibility cut-off date was on-the-job training was nonetheless "employed and working" during the eligibility period because the on-the-job training included actual unit work. In this case, there is no dispute that Neptune was "employed and working" during the eligibility period, that she performed bargaining unit work, and that she performed bargaining unit work in the same relief employment status that she enjoyed since May 2017. The Board's holding in *Dyncorp* is simply irrelevant to this case and shows that the Region again modified the facts of the case to reach a different conclusion enabling the use of a different eligibility test.

5. The Regional Director Erroneously Concluded that Ms. Neptune's Relief Employment was a "Hiatus" and Misapplied the Board's Decision in *Pat's Blue Ribbons*.

The Region's alternate conclusion, that Ms. Neptune was on "hiatus" from May 2017 through May 2018, also ignores Ms. Neptune's relief status and misconstrues Board law. To begin, *there was no "hiatus" in Ms. Neptune's employment.* Her status changed from full-time to relief and there was no break in service at any time. It did not change again. Further, in all of the cases cited by the Regional Director, (Decision, p. 3, 4), a hiatus occurred when a casual, part-time

employee took an official leave of absence and returned from leave to work in the same employment status occupied before the hiatus.[15] There is no case law suggesting that a change in status (i.e. from full-time to relief) creates a hiatus nor is there any support for the Hearing Officer's decision to consider hours previously worked by Ms. Neptune as a full-time employee when her status had undisputedly changed to relief in May 2017.

For example, In *Pat's Blue Ribbons and Trophies*, 286 NLRB 918, 919 (1987), the Board, concluded that a casual employee who worked no shifts for 16 months, but returned to work just prior to the eligibility cut off was ineligible to vote under *Davison-Paxon.* There is no suggestion in *Pat's Blue Ribbons* that the employee's status changed at any point during the hiatus as the employee was a casual, part-time employee at all relevant times before and after the employee's leave of absence. Thus, the Board looked at the number of hours worked before and after the employee's hiatus to determine eligibility under the *Davison-Paxon* test.

Moreover, the Board's decision in *Pat's Blue Ribbons* with respect to employee Dawn Branco contradicts the Hearing Officer's conclusion that Ms. Neptune was on "hiatus" simply because she infrequently sought work until April 2018. Ms. Branco was a casual employee who took a sixteen-month leave of absence from active employment, before returning to work as a casual employee. In the two months prior to Ms. Branco's leave, she worked only 4.5 hours. In the one-month period following Ms. Branco's return from leave, she worked only 14 hours.

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[15] See *Pat's Blue Ribbons,* 286 NLRB 918, 919 (1987) (Board examined pre-leave and reemployment hours to determine eligibility where employee had sixteen month hiatus); *Genesis Health Ventures of West Virginia, LP.*, 326 NLRB 1208 (1998) (calculating eligibility to vote based on hours before and after one month leave of absence); *Wm. T. Burnett and Co.*, 273 NLRB 1084 (1984) (review of payroll records for part-time employee over seven month time period to determine whether employee was regular part-time employee when employee was absent); *Pavilion at Crossing Pointe,* 344 NLRB 582, 583 (2005) (Board examined hours worked before and after layoff to determine voter eligibility when employee was recalled prior to the election).

Looking at a twelve-week period (eight weeks before Ms. Branco's leave and four weeks after her return) Ms. Branco only worked a total of 18.5 hours and was therefore ineligible to vote. Notably, the Board did not exclude any portion of the two-month period prior to Ms. Branco's leave nor consider it as part of the sixteen-month hiatus period simply because Ms. Branco did not work a significant number of hours. Rather, the Board considered the minimal hours worked during the eight-week period in calculating the hours worked for purposes of the *Davison-Paxon* test. Had Ms. Branco worked no hours in the period prior to her hiatus, the decision would not have changed.

Even under the facts of *Pat's Blue Ribbons*, the Board acknowledges that relief employment like Ms. Neptune's is actual employment. The Board explained in *Pat's Blue Ribbons* that the ability to reject work is not determinative of an individual's employment status and does not exclude the individual from being evaluated for eligibility as a casual employee. *Id*. at 918. The Board applied the *Davison-Paxon* test and noted that an "individual's relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit." *Id.* Thus, based on the Board's rationale, and for purposes of the *Davison-Paxon* test, it would be completely illogical to consider a period of relief employment as part of the hiatus simply because the employee chose not to work. This is especially true in cases where the employee has control over his or her shifts and can voluntarily choose when to work based on the employee's schedule. There is no legal basis or justification for considering Ms. Neptune's documented relief employment as a hiatus and to use her prior full-time employment as a basis to calculate Ms. Neptune's eligibility to vote.

Even assuming some period within Ms. Neptune's employment is susceptible to characterization as a "hiatus," it cannot be the entire May 8, 2017, to May 9, 2018, period. It is

undisputed that Ms. Neptune was employed in a relief capacity, was not on a leave of absence, and had not resigned her employment. Even though Ms. Neptune worked no hours in a relief capacity until May 9, 2018, she remained on the active payroll from May 8, 2017, through August 7, 2017, when she was administratively moved to inactive. However, if there is a hiatus, the starting point of any such hiatus would logically be August 7, 2017, when Ms. Neptune was clerically deleted from the active payroll. Applying the methodology for computing eligibility in *Genesis Health Ventures of West Virginia, LP.,* 326 NLRB 1208 (1998), the Board would consider the hours worked over the 23 day period between May 9, 2018, and June 2, 2018, as well as the period from May 8, 2017, to August 7, 2017. During this period, just like the *Davison-Paxon* period, Ms. Neptune worked 32.9 hours, or an average of 2.53 hours per week.[16] The same result would occur if the Board were to consider any period of Ms. Neptune's relief employment prior to May 9, 2018, as the beginning of the "hiatus".

In summary, the Region erred and misapplied Board law by disregarding Ms. Neptune's relief employment status and calling it a hiatus and using hours worked by Ms. Neptune as a full-time employee to calculate hours worked under *Pat's Blue Ribbons* and *Davison-Paxon.*

B. Ms. Neptune Was Not an Eligible Voter Under the Board's *Davison-Paxon* Test.

Under the Board's longstanding and most widely used test to determine the eligibility of on-call employees to vote in a representation election, an on-call employee is found to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to

[16] Ms. Neptune's work hours before and after her hiatus were as follows: (1) May 9, 2018, 10.33 hours; (2) May 11, 2018, 12.17 hours; (3) May 27, 2018, 10.40 hours, for a total of 32.9 hours worked.

the eligibility date. *Davison-Paxon Co.*, 185 NLRB 21 (1970). Although no single eligibility formula must be used in all cases, the *Davison-Paxon* formula is the one most frequently used, absent special circumstances. *See Trump Taj Mahal Casino*, 306 NLRB 294, 295 (1992)

Here, the Regional Director ignored the undisputed facts in a reach to find "special circumstances." Recognizing the absence of any Board cases that would support a finding that Ms. Neptune was eligible to vote, the Regional Director chose to disregard Ms. Neptune's relief employment entirely and relied on case law applicable to new hires and hiatus.[17]

The new hire cases relied upon by the Hearing Officer and the Regional Director, however, are not factually analogous to this case and do not apply. For example, *New York Display & Die Cutting Corp.*, 341 NLRB 930 (2004), *Arlington Masonry Supply*, 339 NLRB 817 (2003), and *Modern Food Mkt*, 246 NLRB 884 (1979) (cited at Decision, p. 3) are irrelevant because they all involve employees who were hired mere days before the eligibility cut-off date with no prior history of employment.[18] Ms. Neptune, on the other hand, had a significant history of employment dating back to January 2015 and was continuously employed in a relief capacity since May 8, 2017. Thus, the Region's decision to treat Ms. Neptune as a new hire and to consider hours after the eligibility date[19] is an extraordinary deviation from the Board's default test in *Davison-Paxon.*

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[17] *See New York Display & Die Cutting Corp.*, 341 NLRB 930 (2004); *Arlington Masonry Supply*, 339 NLRB 817 (2003); *Pat's Blue Ribbons*, 286 NLRB 918, 919 (1987); and *Genesis Health Ventures of West Virginia, LP.*, 326 NLRB 1208 (1998).

[18] Further, none of the cases support the Regional Director's conclusion that a change in status within the eligibility period renders the time period an inaccurate tool for assessing the employee's status going forward. (Decision, p. 3)

[19] In addition, the Hearing Officer's consideration of shifts worked after the eligibility date and through the election is erroneous as such shifts do not reflect the terms of Ms. Neptune's employment prior to the eligibility date because Neptune received a significant wage increase from $13 to $18 dollars per hour as an incentive to take more relief shifts at VCA instead of at another animal hospital. (Neptune, Tr. 247:18-23). Ms. Neptune's employment materially changed after the eligibility date due to a 38% increase in her wages. Thus, hours worked after the eligibility

The Board has not sanctioned looking beyond the eligibility cut-off date for evaluating eligibility except under very narrow circumstances that are not present here. Expanding circumstances where the Board will consider such hours creates confusion as to eligibility, and moves away from a rule-based test for evaluating eligibility to what appears to be an outcome driven expansion.

The Region's misapplication of the hiatus cases also warrants the Board's review and reversal of the Region's Decision. As discussed above, the hiatus cases are also inapplicable because they involve employees who have requested an unequivocal leave of absence or were laid off and returned to the same status before and after the leave. See *Pat's Blue Ribbons,* 286 NLRB 918, 919 (1987) (Board examined pre-leave and reemployment hours to determine eligibility where employee had sixteen-month hiatus); *Genesis Health Ventures of West Virginia, LP.,* 326 NLRB 1208 (1998) (calculating eligibility to vote based on hours before and after one month leave of absence); *AI Investors,* 344 NLRB 582, 583 (2005) (calculating eligibility based on hours worked before and after layoff). Here, hours worked during Ms. Neptune's relief status can and should be the benchmark for the *Davison-Paxon* eligibility period (i.e. looking back from the eligibility date of June 2, 2018). Accordingly, the traditional *Davison-Paxon* test should apply and it is undisputed that Ms. Neptune worked an average of 2.53 hours per week during the eligibility period and she is therefore ineligible to vote.

V. CONCLUSION

For all of the foregoing reasons, the Regional Director's decision should be reversed, and Ms. Neptune's ballot should not be opened or counted.

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date should not be considered because her employment terms were remarkably different. Accordingly, the Board's eligibility test in *Davison-Paxon* fits the facts of this case and should not be disregarded

DATED this 19th day of October, 2018.

By: */s/ Richard Vitarelli*

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Oregon that on this day a true and accurate copy of the document to which this declaration is affixed was filed with the Office of Executive Secretary/National Labor Relations Board and upon the Regional Director of Region 19 using the NLRB e-filing system and was served by email and U.S. Mail upon the following:

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Dated this 19th day of October, 2018, at Portland, Oregon.

/s/ Sherry Rainey
Sherry Rainey